

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICHARD DEEDS,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

Case No. 3:12-cv-00479-LRH-VPC

ORDER

Petitioner has paid the filing fee. The court has reviewed his petition for a writ of habeas corpus pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner will need to show cause why the court should not dismiss this action.

The court takes judicial notice of petitioner's earlier case, Deeds v. Palmer, 3:11-cv-00257-RCJ-VPC. On February 28, 1980, petitioner was convicted of two counts of sexual assault. He received consecutive sentences of life imprisonment with parole eligibility beginning after five years for each count. On February 16, 1982, petitioner was convicted of one count of obtaining money under false pretenses. He received a sentence of five years imprisonment, and it runs consecutively to the sexual-assault sentences.

Petitioner alleges that part of his large and small intestines have been removed, and that he has suffered from Crohn's disease. He further alleges that because of the problems with his digestive tract, he was unable to attend a parole hearing in 2000, and the parole board denied him parole from a sexual-assault sentence for that reason. He claims that the action of the parole board violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq., and that a

1 reasonable accommodation under that law would have been to have paroled him in 2000 from the
2 sexual-assault sentence so that he could start serving the false-pretenses sentence.¹

3 Congress has limited the time in which a person can petition for a writ of habeas corpus
4 pursuant to 28 U.S.C. § 2254:

5 A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a
6 person in custody pursuant to the judgment of a State court. The limitation period shall run
7 from the latest of—

8 (A) the date on which the judgment became final by the conclusion of direct review or the
9 expiration of the time for seeking such review;

10 (B) the date on which the impediment to filing an application created by State action in
11 violation of the Constitution or laws of the United States is removed, if the applicant was
prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the
Supreme Court, if the right has been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been
discovered through the exercise of due diligence.

12 28 U.S.C. § 2244(d)(1) (emphasis added). Any time spent pursuing a properly-filed application for
13 state post-conviction review or other collateral review does not count toward this one-year
14 limitation period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when the post-
15 conviction judgment becomes final upon issuance of the remittitur. Jefferson v. Budge, 419 F.3d
16 1013, 1015 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not “properly filed”
17 and does not toll the period of limitation. Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005). A prior
18 federal habeas corpus petition does not toll the period of limitation. Duncan v. Walker, 533 U.S.
19 167, 181-82 (2001). Section 2244(d) is subject to equitable tolling. Holland v. Florida, 130 S. Ct.
20 2549, 2560 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he
21 has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
22 way’ and prevented timely filing.” Id. at 2562 (quoting Pace, 544 U.S. at 418). The petitioner
23 effectively files a federal petition when he mails it to the court. Stillman v. Lamarque, 319 F.3d
24 1199, 1201 (9th Cir. 2003). The court can raise the issue of timeliness on its own motion. Day v.
25 McDonough, 547 U.S. 198, 209 (2006); Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir. 2001).

27 ¹ Petitioner also alleges that he was denied parole in 2003, 2006, 2009, and 2012 because of
28 his digestive problems, but those allegations post-date the relief that he argues he should have
received.

1 On its face, the petition appears to be untimely. To repeat, petitioner claims that he should
2 have been paroled from a sexual-assault sentence back in 2000. That was the date that petitioner
3 learned the factual predicate of his claim. Petitioner then had one year to file a habeas corpus
4 petition in this court, with the time spent on a state habeas corpus petition tolling that year.
5 Petitioner mailed his federal habeas corpus petition to this court on September 4, 2012, more than
6 ten years after the one-year period apparently expired. Petitioner needs to show that that time was
7 statutorily tolled while a properly-filed state habeas corpus petition was pending, or he needs to
8 demonstrate that equitable tolling is warranted.

9 It is possible for the court to construe the petition as a claim that the denial of parole on June
10 27, 2012, or August 16, 2012,² violated the ADA. The action would then be timely because
11 petitioner commenced it less than a year after the 2012 denial of parole. In that alternative,
12 petitioner would need to show cause why the court should not dismiss the action for his failure to
13 exhaust available state-court remedies. Before a federal court may consider a petition for a writ of
14 habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C.
15 § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's
16 highest court, describing the operative facts and legal theory, and give that court the opportunity to
17 address and resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam);
18 Anderson v. Harless, 459 U.S. 4, 6 (1982).

19 Petitioner states that he did not present his claims to the state courts because claims pursuant
20 to the ADA go directly to federal court. That is untrue. No provision of the ADA restricts actions
21 only to federal courts. The Supremacy Clause of the Constitution makes federal law "the supreme
22 Law of the Land," and state courts are charged with a responsibility to enforce that law. Howlett by
23 and through Howlett v. Rose, 496 U.S. 356, 367 (1990). Petitioner needs to present his claim to the
24 state courts before he can pursue the claim in federal court.

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28 ²Petitioner appears to state at page 1 the denial occurred on June 27 and that an appeal was
decided on August 16.

1 IT IS THEREFORE ORDERED that the clerk of the court file the petition for a writ of
2 habeas corpus.

3 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry
4 of this order to show cause why the court should not dismiss this action as untimely or, in the
5 alternative, for failure to exhaust available state-court remedies. Failure to comply with this order
6 will result in the dismissal of this action.

7 IT IS FURTHER ORDERED that the clerk shall add Catherine Cortez Masto, Attorney
8 General for the State of Nevada, as counsel for respondents.

9 IT IS FURTHER ORDERED that the clerk shall electronically serve upon respondents a
10 copy of the petition and a copy of this order. No response by respondents is necessary.

11 DATED this 28th day of January, 2013.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE